qualification for holding or obtaining a licence to drive whereas the proviso to be construed in the present case is completely different and refers, not to the holding of a licence to drive, but to the permission to drive, and to disqualification, not for holding or obtaining a licence to drive, but from driving."

The judgment in the *Tan Kwang Chin's* case was dissented from in that case. In the *Nasir's* case *supra*, although the learned judge stated that the magistrate whose decision was under revision has misconstrued the decision in the *Tan Kwang Chin's* case (at page 39), he stated (at page 40) that: —

"In my view *Tan Kwang Chin's* case cannot be regarded as an authority to support the contention that a driver who had an expired provisional driving licence is still covered by the terms of his insurance."

As indicated earlier, I am of the view that, for present purposes, there would appear to be no difference between driving with an expired provisional driving licence and driving with an expired driving licence.

Mr. Chew has submitted that, as regards the proviso in the instant case, there appears to be two limbs to that part of the proviso regarding disqualification and that, so long as the appellant is able to show that either limb does not apply to her, then the proviso has no application here. I do not agree. In my view, that part of the proviso regarding disqualification is framed in the alternative and that, so long as it is established that the appellant is caught by either alternative, then she may be regarded as being disqualified from driving.

In the instant case although in the absence of evidence from the representative of the insurance company concerned, I would with respect agree with the decision of Wee Chong Jin C.J. in the *Albert See's* case, nevertheless, taking into account the evidence of the insurance company's representative, I hold that at the material time when the motor vehicle concerned was used by the appellant, she was in fact still covered by the insurance policy. Accordingly, I quash the conviction and sentence against the appellant on the second charge in the lower court. I order that the fine imposed, if paid, shall be refunded to the appellant. I would emphasise that this decision is confined to the particular circumstances of this case. In view of the difficulties created by the wording in the proviso, it is a matter for consideration whether insurers should have that wording amended, if their intention, as here, is to cover the insured person whilst driving with an expired driving licence.

One matter which calls for attention is in relation to the wording of the second charge before the lower court. Section 3(1) of the Motor Vehicles (Third Party Risks) Ordinance (Cap. 130), *inter alia*, prohibits a person from *using* on a road a motor vehicle without third party risks insurance in relation to such user. The charge in the instant case used the word "drive" which is incorrect but I hold that this irregularity did not operate to the prejudice of the appellant and is curable under the provisions of section 331 of the Criminal Procedure Code. Further, the charge also alleged that the appellant used the motor vehicle concerned without "a policy of insurance or such a security in respect of third party risks..." Although I have held that this does not amount to duplicity in the charge, I would draw the attention of police officers that where the prosecution is in a position to particularise as to whether the allegation against the appellant was that there was not in force *either* "a policy of insurance" *or* "such a security" in respect of third party risks then the specific allegation should be made. In this particular case it seems clear from the case record that the prosecution knew that the coverage of third party risks concerned was an insurance policy and the addition of the words "or such a security" in the charge is not only unnecessary but tends to raise arguments as has happened here.

Conviction and sentence quashed.

PALANIAYEE & ANOR. v. TOH WHYE TECK REALTY LTD. & ANOR.

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.) July 12, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 131 of 1972]

Negligence — Dangerous operation — Felling of trees — Duty of care — Workmen's Compensation Ordinance, 1952, s. 8.

In this case a rubber tapper had been employed to assist a mandore in felling old or diseased trees. The mandore used for the purpose a mechanical chain saw. The tapper was killed by the fall of a tree, which fell in his direction. His widow claimed damages on behalf of herself and her children. The trial judge ([1973] 1 M.L.J. 34) dismissed the claim as he held the deceased was solely to blame for the mishap. On appeal,

Held: (1) the mandore had not done all he should to see that the deceased was safely outside the danger area and therefore had failed in the duty of care he owed to the deceased;

(2) there was contributory negligence on the part of the deceased and both of them were equally to blame.

Case referred to:-

(1) *Donoghue* v. *Stevenson* [1932] A.C. 562, 580.

FEDERAL COURT.

Atma Singh Gill for the appellants.

V. C. George and *S. Ponniah* for the respondents.

Ong C.J.: A rubber-tapper was employed overtime to assist his mandore in felling old or diseased trees. The mandore used for this purpose a mechanical chain saw. After about two months' experience in this type of work, the tapper was killed by the fall of a tree, which was partially hollow and fell in a direction somewhat unexpected. His widow claimed damages on behalf of herself and the infant children of the deceased who were dependent on him. The claim was dismissed as the trial judge was of the opinion that the deceased was the author of his own misfortune solely due to his own negligence.

This appeal raises two main grounds: first, that the learned trial judge misdirected himself in finding the mandore in no way to blame and, in the alternative, that in any event the plaintiffs were entitled to award

of compensation under section 41(2) of the Workmen's Compensation Ordinance, 1952.

With all respect to the learned trial judge, I am of opinion that, to hold the mandore totally free from all blame is to fly in the face of the facts. Tree felling, it was conceded, was a dangerous operation. The deceased died as the direct result of an act done by the mandore, the felling of this particular rubber tree. Did he, knowing that his assistant was in the vicinity, do all that should be expected of a reasonable man, to see that the deceased was safely outside the danger area, before he sawed through the last few inches of the trunk? Scrutiny of the evidence shows that he did nothing beyond calling out a word of warning, which, he was unable to say, had been heard *and heeded*. The more dangerous an operation, the higher is the degree of care required at common law of the person engaged in such operation to satisfy himself that no harm will result to others. I think in the instant case it is only necessary to quote the well-known passage in the classic judgment of Lord Atkin in *Donoghue* v. *Stevenson*:[1]

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour. The answer seems to be — persons who are so closely and directly affected by any act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

In my view the mandore has failed in the duty of care he owed to the deceased. It is as clear-cut as that.

On the other hand, it cannot be said that the deceased was unaware of the danger to himself if he remained within the danger perimeter. He owed a duty to himself to take precautions for his own safety. In that respect he failed and paid for it with his life.

In my judgment both were equally to blame. I would allow this appeal, set aside the judgment and award as damages the maximum recoverable under section 8 of the Workmen's Compensation Ordinance 1952, that is to say $5,400, with interest thereon at the rate of 6% from the date of death of the deceased until satisfaction and costs, both here and in the court below. I should add that my calculations, based on earnings, the age of the deceased and the deduction for contributory negligence, produce approximately the same result. I would order payment of the total sum to the widow who has since September 1967 borne the burden of maintaining her infant children and will be continuing to do so for many more years to come. The deposit will be refunded to the appellants.

Gill and **Ong Hock Sim F.JJ.** concurred.

Appeal allowed.

Solicitors: *Atma Singh Gill & Gill; Ng Ek Teong & Partners.*